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No. 79-1729

In the Supreme Court of the United States

OCTOBER TERM, 1979

ERNEST LOWERY MCBRIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a mistrial when his failure to testify was commented on by counsel for his co-defendant during closing argument.

2. Whether petitioner was prejudiced by the admission of extrajudicial statements by an acquitted co-defendant, where the jury was instructed that the statement could not be considered against petitioner unless the jury found beyond a reasonable doubt that the defendant was part of the conspiracy.

3. Whether extrajudicial exculpatory statements by a co-defendant, not in furtherance of the conspiracy, were properly admitted.

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OPINION BELOW

The memorandum opinions of the court of appeals (Pet. Apps. A, B) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 17, 1980. The Chief Justice extended the time for filing a petition for a writ of certiorari to May 1, 1980, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiracy and three counts of wire fraud, in violation of 18 U.S.C. 371 and 1343. He was sentenced to concurrent terms of three years' imprisonment on the substantive counts and given a consecutive sentence of three years' imprisonment on the conspiracy count. The latter sentence was suspended in favor of probation. The court of appeals affirmed by per curiam order (Pet. App. B).

Petitioner was charged, together with Paul Venus, Philip Reid and David Nichols, with using wire communications to further an "advance fee swindle"—*i.e.*, a scheme whereby persons needing loans would be induced to pay finder's fees in advance but would receive neither the loans that they sought nor a refund of the fees they had paid. Reid was a loan broker who contacted potential borrowers and offered them the loan

finding service (App. 6–7, 22, 78–96, 120–121, 130, 152, 176, 213–214, 232–233, 255–256, 271–273).[1] A company owned by Venus—who pleaded guilty and testified for the government—was portrayed as either a source for the loans or a guarantor that would enable the potential borrowers to obtain loans from other sources. Petitioner was the middle man who purportedly would obtain either the loans or the necessary guarantees from Venus's company. In fact, Venus's company was not in a financial position either to make or to guarantee loans (App. 421–422, 425–426, 430–432, 443, 454–456). At petitioner's direction, Venus altered the figures on his company's financial balance sheet so that when petitioner showed it to potential borrowers the company would appear to be financially able to perform the function claimed for it (App. 331–333, 427–432, 435–436). Interstate wire facilities were used to send inducements and assurances to potential borrowers and by the latter to transmit the advance fees (App. 7, 9–10, 77, 79, 215–216, 256, 279, 302–322).

Petitioner put on no witnesses in his defense and did not take the stand. Reid testified extensively about his dealings with petitioner and certain victims of the scheme (App. 540–637, 729–736) and was extensively cross-examined by petitioner (App. 679–729). Petitioner's defense, in closing argument to the jury, was that he had not defrauded anyone because he was at all times attempting in good faith to secure loans or loan guarantees for the applicants, which was, he as-

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[1] "App." refers to the two-volume appendix in the court of appeals.

serted, all he had undertaken to do (App. 774–790). Reid's defense was that he had acted in good faith and relied on petitioner's representations (App. 790–807). Reid and the other co-defendant, Nichols, were acquitted; petitioner was convicted.

ARGUMENT

1. In his closing argument, co-defendant Reid's attorney urged that Reid could not be charged with guilty knowledge on the basis of certain documents, including a letter transmitted to him by petitioner and referring to "our trust department" and "[o]ur underwriting department." He then added: "Well what in the world is the underwriting department? Of course, we don't know what any of these things are because there was never any testimony by [petitioner]" (App. 795). Petitioner requested the court to instruct the jury to disregard the statement, and the court immediately instructed (App. 796):

> Ladies and gentlemen of the jury, in a criminal case, a defendant charged in the bill of indictment is not required to testify. The Constitution of the United States provides that he is not, he or she is not required to testify, and if they do not testify, that cannot be used against them in any way. That's improper argument, and you will not consider it. Blot it out of your mind. Proceed.

Only after petitioner's requested instruction was given did petitioner move for a mistrial. His motion was denied (*ibid.*).

The motion for mistrial was properly denied. We agree that it is not proper for one defendant to com-

ment on the failure of another to testify. The statement here, however, was isolated and casual, referring to the collateral matter of the "underwriting department." No prejudice can be thought to have resulted, in view of the court's immediate and firm instruction to the jurors not to consider counsel's comment but to "[b]lot it out of your mind." Compare *United States* v. *Kaplan*, 576 F.2d 598, 600 (5th Cir. 1978), cert. denied, 439 U.S. 1078 (1979).

Petitioner inappositely invokes *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), for the proposition that a curative instruction was an insufficient remedy and a mistrial was required (Pet. 10). However, the result in *DeLuna*—the only case cited by petitioner in which the conviction was reversed because of comments by a co-defendant on the defendant's failure to testify—was the product of the peculiar facts of that case, as the Fifth Circuit itself and other circuits have subsequently pointed out in distinguishing its holding.

First, as the *DeLuna* court itself noted, the comments by co-defendant's counsel "were not casual or isolated references; they were integral to Gomez's defense" (308 F.2d at 143). See also *United States* v. *Washington*, 550 F.2d 320, 328 (5th Cir.), cert. denied, 434 U.S. 841 (1977) (referring to the fact that counsel in *DeLuna* "repeatedly commented" on the failure to testify); *United States* v. *Moreno-Nunez*, 595 F.2d 1186–1187 (9th Cir. 1979). Moreover, the co-defendants in *DeLuna* "argued mutually inconsistent defenses to the jury, in that each attempted to convince the jury that the other was to blame for the crime charged," *United States* v. *Alpern*, 564 F.2d

755, 761 (7th Cir. 1977); see also *United States* v. *Nakaladski*, 481 F.2d 289, 302 (5th Cir.), cert. denied, 414 U.S. 1064 (1973); *United States* v. *Shuford*, 454 F.2d 772, 779 (4th Cir. 1971); *United States* v. *Hines*, 455 F.2d 1317, 1334 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972). Thus, "if one defense were believed, the other could not be." This created a dilemma for the jury, which might have been resolved on the basis of repeated reminders that one defendant had testified and the other had not. *United States* v. *Kahn*, 381 F.2d 824, 841 (7th Cir.), cert. denied, 389 U.S. 1015 (1967). The intended effect of the comments was to invite the jury to infer DeLuna's guilt—and hence Gomez's innocence—from DeLuna's failure to testify, see *United States* v. *Kaplan*, *supra*, 576 F.2d at 600, and this effect was magnified by the extended colloquy between the court and lawyers regarding the comments (see 308 F.2d at 154–155). In short, as noted in *United States* v. *Hines*, *supra*, the "'real prejudice in the *DeLuna* case was not in the comment on failure to take the stand but in the situation to which the comment was directed'"—*i.e.*, the strongly antagonistic defenses. 455 F.2d at 1334 n.15, quoting 8 *Moore's Federal Practice* ¶ 14.04[3], at 14–22 (1965 ed.).

The present case is quite different. The statement was made in passing, and Reid's and petitioner's defenses were not mutually exclusive. Petitioner's defense was not that Reid, rather than petitioner, had perpetrated the fraud; it was that petitioner, as a broker, had undertaken only to attempt to secure loans or guarantees, and had carried out that obligation in good faith. Reid's defense was that he had acted

in good faith, without intent to defraud the potential borrowers; this defense did not assume the existence of a conspiracy to defraud, but merely took the position that if there was such a conspiracy, Reid was not part of it (see Pet. 9). It is true that Reid claimed to have relied on petitioner's representations as much as did the potential borrowers. But, unlike in *DeLuna*, it was not necessary for Reid's acquittal that the jury convict petitioner. Under these circumstances, there is no reason to believe that the court's prompt and forceful instruction did not cure any prejudice to petitioner from counsel's statement.

2. Petitioner argues (Pet. 10–15) that the district court erred in allowing certain witnesses to testify about statements made to them by co-defendant Reid. Petitioner does not identify the witnesses or their objectionable testimony, but he presumably refers to testimony by victims of the advance fee scheme. As petitioner concedes, however (Pet. 10–11), the court, in admitting the evidence, instructed the jury that the evidence was to be considered only against Reid until and unless the jury found beyond a reasonable doubt that, at the time the statements were made, a conspiracy existed and that petitioner and Reid were willful participants in it (App. 4–5, 846). Petitioner argues, however, that in accordance with case law interpreting Fed. R. Evid. 104, the court should have made a preliminary determination that it was more likely than not that there was a conspiracy, that petitioner and Reid were members, and that the statements were made in furtherance of the conspiracy. See, *e.g.*, *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. de-

nied, 442 U.S. 917 (1979); *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979).

It is true that the court did not make a finding on the record along the lines suggested by petitioner and by the cases upon which he relies, and we agree that the court should ordinarily do so.[2] It is possible that such a finding might be inferred from the court's decision to allow the evidence to be considered by the jury. *United States* v. *Continental Group, Inc.*, *supra*, 603 F.2d at 457–458, and cases cited. But, in any event, the court's failure to make an express finding on admissibility in this case was clearly harmless error.

As noted, the court instructed the jury that it could consider the evidence as against petitioner only if the jury found *beyond a reasonable doubt* that, at the time the statements were made, a conspiracy existed and petitioner and Reid were participants in it. As the cases relied upon by petitioner (Pet. 11–12) amply demonstrate, since the advent of Rule 104, a defendant is not entitled to an instruction placing such a strict limitation on the jury's consideration of a co-conspirator's declarations. Petitioner was therefore advantaged by the court's instruction, and there is no reason to believe that the jury disregarded it. There was ample other evidence in the record—including documentary evidence and the testimony of Venus, Reid and others who had personal encounters with petitioner—to support his conviction without regard to the testimony as to Reid's statements.

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[2] Petitioner did not request the court to make such a finding.

There was also ample evidence, surely a preponderance (see, *e.g.*, *United States* v. *James*, *supra*, 590 F.2d at 582), that a conspiracy existed, that petitioner and Reid were participants, and that Reid's statements were made in furtherance of the conspiracy, thereby making entirely proper the jury's consideration of Reid's statements against petitioner. The acquittal of Reid, whether because of the jury's reasonable doubt about his guilt or for some other reason, does not undercut the satisfaction of the threshold preponderance-of-the-evidence standard for admissibility of the evidence. Moreover, the evidence overwhelmingly establishes a joint enterprise on the part of Reid and petitioner. It is proof of such an enterprise, rather than a conspiracy as such, including an unlawful agreement, which is necessary to satisfy the co-conspirator declaration exception in Fed. R. Evid. 801(d)(2)(E). *United States* v. *Gil*, 604 F.2d 546 (7th Cir. 1979); *United States* v. *Trowery*, 542 F.2d 623, 626 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).

What is more, Reid in fact testified at length about his dealings with the loan applicants and petitioner, and he was subjected to extensive cross-examination by petitioner. This is not a case, then, in which a defendant might have been prejudiced because of the absence of an opportunity to confront the declarant and cross examine him regarding the truth of the out-of-court statements. *Nelson* v. *O'Neil*, 402 U.S. 622 (1971). Accordingly, even if the statements were technically hearsay, Reid's extensive testimony on the same subject matter negates any possibility that their admission was prejudicial error justifying reversal.

Finally, the exception for declarations of a co-conspirator to one side, Reid's statements regarding petitioner appear to have been admissible under Fed. R. Evid. 801(d)(2)(D) in any event.[3] It appears that Reid took directions from petitioner with respect to the loan applications involved here (App. 644) and that he was therefore acting as petitioner's agent in dealing with the applicants. This claim therefore does not warrant review by this Court.

3. Petitioner also objects (Pet. 15–17) to testimony by FBI Agent Turner recounting Reid's statements to him about the advance fee scheme (App. 480–500). This objection is baseless. In the first place, petitioner did not initially object until half way through Turner's testimony, and then only on the ground that the testimony was repetitious, not because it was hearsay as to him (App. 492).[4] Furthermore, at petitioner's request, the court later gave the following instruction (App. 502):

> Ladies and gentlemen of the jury, upon the motion of the defendants Nichols and McBride, the Court instructs you that the alleged statements made by the defendant Reid to the FBI Agent Turner, who testified Friday, will not be considered by you in any respect. All the testimony of the witness

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[3] Rule 801(d) provides:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) Admission by a party-opponent. The statement is offered against a party and is * * * (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, * * *.

[4] The testimony was plainly admissible as to Reid. Fed. R. Evid. 801(d)(2)(A).

> Turner will be considered by you only against the defendant Reid and not against the other defendants in any respect. The witness testified to certain alleged statements which were made by Mr. Reid, the defendant Reid. They will be considered by you only for or against the defendant Reid and not against the other defendants.

Petitioner seizes upon the isolated statement in the instruction that the agent's testimony could be considered "for or against" Reid as indicating that the jury could consider the testimony for the benefit of Reid and, thereby, to the detriment of petitioner (Pet. 16). But elsewhere in the instruction the court makes it clear that the evidence was not to be considered by the jury "in any respect" as to petitioner, and was to be considered only "against" Reid and not "against" petitioner. It seems unlikely the jury would have attached much significance to the single reference to consideration of the evidence "for" Reid. Petitioner did not object to the court's cautionary instruction, on this or any other ground, when it was given, and he should not be permitted to raise such an objection here. Fed. R. Crim. P. 30. Because the testimony was not to be considered against petitioner, his reliance on Fed. R. Evid. 801(d)(2)(E) and *Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963), regarding admissibility of a co-conspirator's declarations as against the defendant, are without merit.

In any event, as explained above, petitioner's defense was not inconsistent with Reid's. Both petitioner and Reid sought to convince the jury that they acted in good faith within the customary boundaries of the role of a loan broker. Consideration of Agent Turner's tes-

timony in Reid's favor therefore would not necessarily have redounded to petitioner's detriment. To be sure, the agent's testimony recounted statements by Reid that he had relied on representations by petitioner, but this is nothing more than what Reid himself testified to at length during the trial. Thus, the agent's testimony regarding Reid's statements mentioning petitioner, as well as Reid's statements referring to victims of the advance fee scheme, were at most duplicative of the trial testimony of Reid and the victims. Given this, and the court's instruction that this testimony was not to be considered in connection with petitioner in any event, petitioner's assertion of error is wholly without merit.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] *United States* v. *Blackshire*, 538 F.2d 569 (4th Cir.), cert. denied, 429 U.S. 840 (1976), and *United States* v. *Ziegler*, 583 F.2d 77 (2d Cir. 1978), upon which petitioner also relies (Pet. 17), are inapposite. In *Blackshire*, admission of the statement to the police by one defendant was held to be error because it was admitted against his co-defendant as well. See 538 F.2d at 571. In *Ziegler*, the extrajudicial statement at issue was not made by a co-defendant at all, but rather was a statement by an informer, and it too was admitted against a defendant. See 583 F.2d at 81.

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